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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-194633.2

DATE: September 4, 1979

MATTER OF: NCR Corporation

DLG 02672

DIGEST:

*[Protest Alleging that Awardee's Proposal Was Not Responsive
To Mandatory RFP Requirement]*

1. Concept of "responsiveness" is not applicable in negotiated procurements and fact that initial proposal is not in full compliance with all terms of RFP is not basis to reject proposal if deficiencies are reasonably subject to being made acceptable through negotiations.
2. Meaningful negotiations occur where protester answers written questions in response to request for clarification of proposal, conducts benchmark tests, and submits best and final offer prior to contract award.
3. Where written record shows successful offeror agreed prior to award to comply with specific terms of the RFP and contract does not conform to those terms, contract may be amended to reflect actual agreement of parties.

DLG 02673

NCR Corporation (NCR) protests the award of a contract for programmable (intelligent) terminals to Sycor, Inc. (Sycor), by Action under Request for Proposals (RFP) No. 78-33. The bases for the protest are that Sycor's proposal allegedly was not "responsive" to a mandatory requirement of the RFP; that the contract was awarded without conducting meaningful discussions with the offerors, as required by Federal Procurement Regulations (FPR) § 1-3.805 (1964 ed. amend. 153); and that the contract awarded did not conform to the RFP requirements for on-call maintenance response time and notification for delivery. For the reasons set forth below, the protest is denied. AGC00349

A notice for the procurement of the terminals appeared in the Commerce Business Daily on June 8, 1978, with July 12, 1978, specified as the closing date for receipt of initial proposals. As a result

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of technical questions from prospective offerors and subsequent amendments to the original RFP, the closing date for receipt of initial proposals was extended to November 13, 1978. Twelve proposals were received by that date. After review, the evaluation panel concluded that five proposals were unacceptable and could not reasonably be made acceptable by negotiation. The seven remaining offerors included in the competitive range were notified of the points in their proposals needing "clarification." As a result of the evaluation of the responses to those points, four more offerors, including the protester, were disqualified from the competition. Those firms were so notified and were given the specific reasons for the rejection of their proposals on January 15, 1979. The remaining offerors (including Sycor) were provided the requirements for benchmark demonstration tests.

NCR took exception to the reasons given for its disqualification. After reviewing NCR's arguments, the evaluation panel reversed its position regarding the firm and qualified NCR for the demonstration tests. All qualified offerors successfully completed the tests and were requested to submit best and final offers by March 29. Action awarded the contract to Sycor on April 5, 1979.

NCR claims that Sycor was "nonresponsive" to the RFP, and, therefore, should not have been considered for award, because Sycor allegedly could not have been in compliance with RFP paragraph E.13.2, Validation of COBOL Compilers. That provision required that to be "responsive" an offeror must certify in its proposal that all COBOL compilers offered in response to the solicitation have been submitted for validation testing and compliance with certain Federal standards as set forth in Federal Property Management Regulations § 101-32.1305-1a (1977). NCR states that it has determined that Sycor did not request validation of its COBOL compiler until January 4, 1979, nearly 2 months after initial proposals were submitted. NCR suggests that if Sycor did in fact submit in its

initial proposal the certification required by paragraph E.13.2, such certification was false and, therefore, should have resulted in the firm's disqualification from the competition.

The record indicates that Sycor's initial proposal did include the subject certification. NCR is correct that a validation was not actually requested until January 1979. However, Sycor has justified the certification on the basis that in August of 1978 the firm "began" the validation process through a meeting with the testing activity to determine the steps necessary for validation, and by acquiring certain test tapes from the Government on September 13, 1978, for preliminary validation, apparently a customary practice. While it may be disputed that such action constituted a proper "submission" for validation as contemplated by the RFP, and whether the certification therefore was accurate, we have no basis to conclude that it was made in bad faith.

In any case, the concept of "responsiveness," used by both NCR in its protest and Action in the solicitation, is not applicable in negotiated procurements. TM Systems, Inc., 56 Comp. Gen. 300 (1977), 77-1 CPD 61. Thus, the fact that an initial proposal may not be fully in accord with RFP requirements is not reason to reject the proposal if the deficiency is reasonably subject to being made acceptable through negotiations. In this respect, we have stated that the basic purpose of a negotiated procurement is to determine whether deficient proposals are reasonably subject to being made acceptable through discussions. B-176089, September 26, 1972.

It follows, therefore, that notwithstanding the wording of paragraph E.13.2, Sycor should not have been rejected as "nonresponsive" if it failed to complete the certification or submit its compiler for validation prior to the submission of its initial proposal, as long as the submission was accomplished at some point before award. TM Systems, Inc., *supra*. In this connection, the record indicates that the compiler was both submitted and validated prior to April 5, the

award date. We also note that under the terms of the solicitation offerors had 12 months from the time of contract award to have the validation completed. In view thereof, we do not see how NCR was prejudiced by Sycor's certification, and the protest on this issue is denied.

With regard to NCR's second basis of protest, written or oral discussions in a negotiated procurement must be meaningful. Washington School of Psychiatry/The Metropolitan Educational Council for Staff Development, B-192756, March 14, 1979, 79-1 CPD 178, at page 10. The content and extent of discussions necessary to determine whether they were, in fact, "meaningful" is a matter of judgment primarily for procuring officials and will not be disturbed by our Office unless the judgment is arbitrary or without a reasonable basis. Broomall Industries, Inc., B-193166, June 28, 1979, 79-1 CPD 467. We have held that requests for clarification or amplification or other statements made during discussions which lead offerors into areas of their proposals that are unclear are sufficient to alert offerors to deficiencies in their proposals. Serv-Air, Inc., 57 Comp. Gen. 827 (1978), 78-2 CPD 223. We have also held that a request for best and final offers may in itself constitute "meaningful negotiations" since price and technical aspects may be revised in response thereto. See American Nucleonics Corp., B-193546, March 22, 1979, 79-1 CPD 197; Analysis & Computer Systems, Inc., 57 Comp. Gen. 239 (1978), 78-1 CPD 75.

In this case, NCR answered questions from Action regarding its proposal, was able to change Action's position and be placed on the "qualified" list, was allowed to conduct benchmark tests, and was asked to submit a best and final offer. We note here that the record indicates that Action allowed offerors to submit only price and not technical revisions in the best and final offers. However, we point out that both technical and price revisions should be permitted as a result of negotiations. Analysis & Computer Systems, Inc., supra. Nevertheless, NCR clearly was not prejudiced in

that regard, since the firm's offer was technically acceptable, and award under the RFP was to be based on the lowest overall cost to the Government.

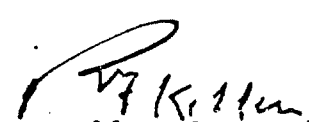
Under the circumstances, we find the communications between Action and NCR constituted "meaningful negotiations" within the context of a negotiated procurement.

Finally, NCR contends that the contract between Action and Sycor does not comply with the solicitation upon which all other offers were based in two respects: the written notice required from the agency prior to the scheduled installation date (paragraph G.3.1(A) of the contract) is 45 days rather than the 30 days stated in the RFP, and the contract's on-call maintenance response time (paragraph G.4.3 of the contract) is 4 hours whereas the RFP stated 2 hours. NCR argues that had it been afforded the opportunity to base its proposal on those requirements, it could have offered a lower price than it actually did.

The record shows that Sycor, in its initial proposal, requested negotiation of these two provisions. However, on December 26, Sycor specifically agreed to comply with the RFP provisions in question. Although the contract does contain the changes Sycor requested in its original proposal, the contract is in error in this respect, since Sycor agreed to the 30-day notice requirement and the 2-hour response time that section G contained. Action informs us that the contract will be modified to reflect the actual agreement of the parties, i.e., paragraph G.3.1(A) will be changed from 45 to 30 days and paragraph G.4.3 from 4 to 2 hours. We find no basis to object to the proposed amendment.

The protest is denied.

Deputy]


Comptroller General
of the United States